

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7479

To be argued by
MICHAEL S. OBERMAN

In The
United States Court of Appeals
For The Second Circuit

NATIONAL EQUIPMENT RENTAL, LTD.,

Plaintiff-Appellant,

vs.

BERNARD QUINTIN and THOMAS QUINTIN, Ind. and
d/b/a THE QUINTIN COMPANY, Co-Partners Under the
Laws of the State of California, and DOROTHY K. QUINTIN,

Defendants-Appellees.

BRIEF AND APPENDIX FOR DEFENDANTS-APPELLEES

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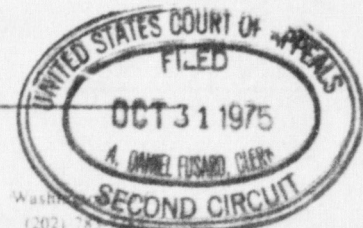
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
NATIONAL EQUIPMENT RENTAL, LTD., :
Plaintiff-Appellant, :
-against- :
BERNARD QUINTIN and THOMAS QUINTIN, : Docket No. 75-7479
Ind. & d/b/a THE QUINTIN COMPANY :
Co-partners under the laws of the :
State of California and DOROTHY K. :
QUINTIN, :
Defendants-Appellees. :
-----X

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal by the plaintiff-appellant, National Equipment Rental, Ltd. ("the appellant"), from an order of the Honorable John R. Bartels, dated June 24, 1975 and entered in the United States District Court for the Eastern District of New York on June 27, 1975. Judge Bartels' order dismissed the complaint with prejudice but, at the same time, provided for its restoration to the calendar upon appellant's payment, within 10 days after entry of the order, of attorney's fees in the amount of \$1,000, incurred by defendants-appellees ("the appellees") as a

direct result of appellant's failure to appear at pre-trial proceedings of the district court on December 13, 1973, March 18, 1975 and April 22, 1975.

Issues Presented

1. Does the district court have power to impose, as a condition for vacating its order dismissing a complaint for lack of prosecution, an award of attorney's fees to the defendants?

2. Did the district court abuse its discretion in awarding attorney's fees in the amount of \$1,000 to appellees, in view of appellant's repeated failures to appear at pre-trial proceedings and of its failure to prosecute?

Statement of the Case

This action, alleging breach of contract, was commenced in the Supreme Court of the State of New York, Nassau County, in May, 1973 (42, 45-56).^{*} Upon petition of the appellees, the case was removed in June, 1973 to the United States District Court for the Eastern District of New York and was assigned to Judge Bartels for all purposes (42-43). In July, 1973, appellees moved, pursuant to 28 U.S.C. §1404(a), to transfer the case to the Central

^{*} Numbers are page references to the appendix prepared by the appellant; numbers preceded by "Tr." are page references to the transcript of the hearing before Judge Bartels held on May 22, 1975, which is annexed as an appendix to this brief.

District of California (61); appellees, who operated a small family business in California, had entered the contract now in suit under the impression that they were dealing only with a California principal, because all negotiations occurred in California (61D). The motion to transfer was denied by Judge Bartels in August, 1973 (105-06).

Issue was joined on October 1, 1973 (2, 107-113). However, between that date and June 24, 1975, when Judge Bartels dismissed the complaint, development of the merits never progressed beyond the pleadings. No discovery was taken, no demands for discovery were served, and no motions for summary judgment were made (2-3, 19, Tr. 8). All that did occur in this time was the scheduling by the district court of several pre-trial proceedings, the failure of the appellant to attend three such proceedings (10-11), the three dismissals by the district court of the complaint for such failures (40, 41, 4), and the motions by the appellant to vacate two of the three orders of dismissal (2-3, 116-17, 126).*

* During this period, counsel of record for appellees changed. Appellees were originally represented in this action by the New York firm of Golenbock and Barell (43). However, that firm, upon its own motion, was relieved as counsel by order of Judge Bartels, dated February 28, 1974 (33). Between that date and May 21, 1975, when the firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll was retained by appellees (20), appellees had no local counsel of record, for they believed the case had been dismissed or, at least, was not being pursued (30). Appellees did in the interim consult the California firm of Wall and Fergus, to ascertain whether this was, in fact, the status of the case (23-25).

A pre-trial status conference before Judge Bartels was originally scheduled for October 16, 1973 (2), but was adjourned, by consent of counsel, first to November 19 (39), and then to December 13, 1973. The court called the case on December 13 (2, 40). However, appellant, which is represented in this action by its in-house counsel, failed to appear (40). Judge Bartels entered an order dismissing the complaint, with permission to the appellant to move within 30 days to vacate the dismissal by furnishing an affidavit showing a good cause of action and a valid excuse for its failure to appear (40). On January 29, 1974, the case was restored to the calendar upon the affidavit of Nick Limar, an attorney on appellant's legal staff, who stated, in part, that he had been assigned to attend the pre-trial conference but had failed to appear due to "unusually heavy and congested traffic" (121, 116-17).

The case remained dormant between January 29, 1974 and February 19, 1975, when it was again set down for a pre-trial status conference for March 18, 1975 (2). Once more, appellant's counsel failed to appear, and Judge Bartels again dismissed the complaint, with permission for the appellant to move to vacate the dismissal within 20 days, upon furnishing an affidavit showing a good cause of action and a valid excuse for this second failure to appear (41). A motion to restore the action, returnable

on April 7, 1975, was filed on March 24 (2, 126). Jerome Heller, another member of appellant's legal staff, stated in the moving affidavit that he had received a written notice of the status conference but failed to enter the date on his diary; as a result, he failed to appear in court on the scheduled date (128).*

The return date of this motion was adjourned until April 22, 1975. On that return date, appellant, for a third time, failed to appear at a scheduled pre-trial proceeding of the district court (10-11). The attorney sent to argue the motion supposedly had a flat tire en route to court (11).

The motion was rescheduled for May 22, 1975. Both parties, represented by counsel, appeared on that date and a hearing was finally held (Tr. 1-11). At its conclusion, Judge Bartels ruled that, in view of appellant's repeated failures to appear and of its failure to prosecute the case, the complaint would be dismissed, unless appellant (i) submitted an affidavit justifying its repeated failures to appear and (ii) paid to appellees an amount up to \$1,200 as expenses and attorney's fees related to such failures to appear (Tr. 9-10). By his order dated June 24, 1975, Judge Bartels found

* In a later affidavit, this failure to appear was said to be due to traffic conditions (10-11), rather than to Mr. Heller's claimed clerical error.

that condition (i) had been satisfied and fixed attorney's fees at \$1,000. It is from this order that the appellant appeals. The order stated in pertinent part:

"ORDERED, that the complaint be, and the same hereby is, dismissed with prejudice, unless plaintiff (i) submits within thirty days from the date hereof an affidavit establishing to the Court that good cause exists for plaintiff's failure to appear at pre-trial proceedings on December 13, 1973, March 13, 1975 and April 22, 1975; and (ii) pays to defendants, within ten (10) days of entry of an order restoring the action, the amount of \$1,000.00 as attorney's fees incurred by defendants as a direct result of plaintiff's failures to appear. Having satisfied (i) above the case will be restored to the calendar automatically upon payment of \$1,000" (4-5) (emphasis added).

Appellant did not pay any attorney's fees as set forth in the order, nor did it seek a stay of Judge Bartels' order either from the district court or from this Court. However, appellant moved on July 30, 1975 to enlarge the time for appeal, on the ground that it did not receive notice of the order until July 18 (137-38). This motion was granted, without opposition, on August 15, 1975 (140).

Pursuant to the terms of Judge Bartels' order, the condition for restoring the case to the calendar lapsed on July 7, 1975, ten days after entry of the order (4). Thus, unless the order is reversed on appeal, the complaint has been dismissed with prejudice.

Argument

Point I

THE DISTRICT COURT HAS POWER TO IMPOSE AS A CONDITION TO ITS ORDER VACATING THE DISMISSAL OF A COMPLAINT FOR WANT OF PROSECUTION AN AWARD OF ATTORNEY'S FEES TO THE DEFENDANT.

It is clearly established, as appellant concedes, that a district court has inherent power to dismiss a complaint on the ground of lack of prosecution. Link v. Wabash Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); Theilmann v. Rutland Hospital, Inc., 455 F.2d 853, 855 (2d Cir. 1972); Brief for Plaintiff-Appellant, pp. 9-[10]; see Fed. R. Civ. P. 41(b); E.D.N.Y. Ind. Assign. and Cal. R. 7-8. Under the cited local court rules of the Eastern District, failure to attend a pre-trial conference may be considered a failure to prosecute.

Appellant contends, however, that the district court lacks discretionary power to impose an award of attorney's fees as a less severe sanction for failure to prosecute and that an order vacating dismissal of a complaint for failure to prosecute cannot be conditioned on such an award. In fact, there is ample authority to support the order under review.

While, as noted, dismissal of the complaint is clearly an available sanction for lack of prosecution, this is viewed as a harsh remedy. Theilmann v. Rutland Hospital, Inc., supra; Richman v. General Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971); Durham v. Florida East Coast Railway Co., 385 F.2d 366, 368 (5th Cir. 1967); Davis v. Operation Amigo, Inc., 378 F.2d 101, 103 (10th Cir. 1967). Thus, this Court has, on occasion, voiced approval of alternative and less severe sanctions to be imposed for failure to prosecute. Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967); Bardin v. Mondon, 298 F.2d 235, 238 (2d Cir. 1961). See also Waterman, An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders, 29 F.R.D. 420, 425-26 (1961); Note, Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation, 72 Yale L.J. 819 (1963); Note, Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure, 38 Notre Dame Lawyer 158 (1963).

In Schwarz, the Court affirmed a dismissal of a five year old complaint for failure to prosecute, where plaintiff's counsel was unprepared to proceed to trial, but the Court added:

"We would, however, suggest that the court keep in mind the possibility, in future cases of inexcusable neglect by counsel, of

imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal." 384 F.2d at 836.

This approach of imposing costs and attorney's fees on the delinquent lawyer, rather than on the client, has been specifically adopted by the Eastern District. E.D.N.Y. Ind. Assign. and Cal. R. 8(b).

The district judge, however, is not limited to this one alternative sanction, and Judge Bartels properly imposed the sanction of attorney's fees on a plaintiff itself rather than on its in-house counsel. See Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442 F.2d 1047, 1053-54 (9th Cir. 1971), cert. denied, 404 U.S. 1039, 92 S.Ct. 715, 30 L.Ed.2d 731 (1972); Richman v. General Motors Corp., supra, 437 F.2d at 199; cf., 6 C. Wright & A. Miller, Federal Practice and Procedure § 1524, pp. 581-82 (1971); 3 Moore's Federal Practice ¶16.19 at 1134-36 (1974). The determination of which sanction, if any, to impose is entrusted to the sound discretion of the district court, which cannot be reversed absent a showing of a clear abuse. Richman v. General Motors Corp., supra, 437 F.2d at 200; Himalayan Industries v. Gibson Manufacturing Co., 434 F.2d 403, 405 (9th Cir. 1970); see, Theilmann v. Rutland Hospital, Inc., supra, 455 F.2d at 855; Schwarz v. United States, supra, 384 F.2d at 835.

Moreover, Judge Bartels' order of June 24 may be viewed as a dismissal of the complaint under Fed. R. Civ. P. 41(b) and under the inherent power of the court, supra, coupled with relief from this final judgment in view of excusable neglect, Fed. R. Civ. P. 60(b). The latter rule provides that the district court may grant relief "upon such terms as are just." Under this rule, a district judge may award attorney's fees. Dyotherm Corp. v. Turbo Machine Co., 39 F.R.D. 370, 372-73 (E.D. Pa. 1966); Trueblood v. Grayson Shops of Tennessee, Inc., 32 F.R.D. 190, 195 (E.D. Va. 1963); Hendricks v. Alcoa S.S. Co., 32 F.R.D. 169 (E.D. Pa. 1962); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2857, pp. 162-63 (1973); cf. Himalayan Industries v. Gibson Manufacturing Co., supra, 434 F.2d at 405.

Appellant places sole reliance on the case of Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909, 86 S. Ct. 1342, 16 L.Ed.2d 361 (1966), citing it for the irrelevant proposition that attorney's fees are generally not awarded as part of a judgment in an action at law. Here, attorney's fees were imposed as a sanction. Moreover, that case is clearly distinguishable. There, the district court granted a motion for voluntary dismissal with prejudice of two complaints and, in addition, awarded attorney's fees to the defendants. The Court of Appeals for the Sixth Circuit held that where a complaint is dismissed

with prejudice upon a motion for voluntary dismissal, attorney's fees cannot be imposed; in effect, a dismissal with prejudice is sufficient sanction for any inconvenience caused by the plaintiff. Where, however, a complaint is dismissed without prejudice upon motion of the plaintiff, it is settled that attorney's fees may be allowed. Smoot v. Fox, supra, 353 F.2d at 833; 9 C. Wright & A. Miller, Federal Practice and Procedure § 2366, pp. 179-80 (1971) (and cases cited). In that situation, some sanction is required to compensate the defendant for his inconvenience, in view of the fact that plaintiff may at some future point pursue the claim.

The award of attorney's fees upon the granting of a motion for voluntary dismissal provides a situation analogous to the one at bar. Judge Bartels' order sought to compensate appellees in some measure for the inconvenience suffered through the actions of appellant's counsel, before permitting the case to proceed. Cf., Fed. R. Civ. P. 37(b)(2)(E).

Thus, Judge Bartels had the power to dismiss the complaint and to impose an award of attorney's fees as the condition for restoring it to the calendar. His order should be affirmed and the complaint should remain dismissed.

Point II

THE DISTRICT COURT DID NOT ABUSE
ITS DISCRETION WHEN IT AWARDED
ATTORNEY'S FEES TO APPELLEES IN
THE AMOUNT OF \$1,000.

Appellant contends that even if Judge Bartels had the power to award attorney's fees, the record supports neither the imposition of this sanction on it nor an award in the amount of \$1,000. In fact, the record fully supports the award made by Judge Bartels.

- A. Appellant's absolute failure to prosecute and its repeated failures to appear at pre-trial conferences justified imposition of a sanction.

The present record provides a classic case of lack of prosecution. Beyond serving a complaint in May, 1973 and responding to appellees' motion to transfer the case in July, 1973, appellant failed to take any steps during the two year pendency of the action to prosecute it. No discovery at all was taken by appellant. Indeed, no depositions were scheduled, no documents were requested, and no interrogatories were propounded. Further, although appellant has recently contended that the case is ripe for summary judgment (12), no motion for summary judgment was ever served; according to appellant, the motion papers were being drafted as early as October, 1973 and yet they were still being drafted as late as May, 1975 (39, 12-13).

Appellant attempts in its brief to twist the record to suggest that appellees were responsible for this clear failure to prosecute. Beyond the inherent absurdity of this suggestion that a plaintiff bent on prosecution can be so easily distracted, the record clearly shows appellant responsible for its own failures. For example, appellant attaches great importance to the fact that appellees' original local counsel was relieved in early 1974; appellant argues that it could not act because it was confused by its adversary's identity. However, it is clear that the Federal Rules of Civil Procedure provide a plaintiff with ample remedies and methods to vigorously prosecute a claim, even where a defendant is either unrepresented by counsel or has changed his counsel during the course of the litigation.

Similarly, appellant makes much of several extensions of time to answer the complaint granted to appellees and inaccurately states that the initial pre-trial conference scheduled for October 16, 1973 was adjourned only because appellees' former attorneys were having difficulties contacting their clients. Brief for Plaintiff-Appellant, pp. 8-9, 2. In fact, requests to extend the time to answer are routine and do not impede a plaintiff's ability to prosecute; in any event, no steps were taken to prosecute the case for almost twenty-one months after the answer was served. More-

over, the request for the adjournment of the first status conference was made upon consent of both parties through a written request of appellant's counsel, in which he stated as additional reasons for the requested adjournment that the parties were still investigating certain information and that he was preparing a motion for summary judgment -- the motion as yet never served (39).

Beyond its inactivity during the pendency of the action, appellant's failure to appear at pre-trial conferences compounded the consequences of this failure to prosecute. Under the local rules of the Eastern District, the district judge to whom a case is assigned may hold status conferences to supervise discovery, to discuss settlement and to move the case towards trial. E.D.N.Y. Ind. Assign. and Cal. R. 7. Here, Judge Bartels' efforts to move the case along were thwarted by appellant's failures to appear each time a conference was held and by the resulting motions and paperwork connected with subsequent motions to restore the action to the calendar (Tr. 5, 8).

On review of the exercise of discretion by the district court in imposing a sanction for failure to prosecute, this Court may reverse only upon a showing of clear abuse of that discretion. Schwarz v. United States, *supra*, 384 F.2d at 835. Here, no abuse of discretion has been shown.

B. The record supports an
award of at least \$1,000.

The record also supports an award in the amount of at least \$1,000. Appellant argues that the only action taken by appellees' counsel was an appearance at the hearing on May 22, 1975 and that this does not justify an award of \$1,000. Brief for Plaintiff-Appellant, pp. [10]-[11]. In fact, the efforts of counsel went considerably beyond this one appearance. Judge Bartels' decision to award counsel fees incurred as a result of appellant's defaults at pre-trial conferences had reference not merely to this hearing on the most recent motion to restore, but rather encompassed the legal consultation and work required in connection with appellant's repeated failures to appear (4-5, Tr. 11). The affidavits of Michael S. Oberman and Jay J. Wall referred to in Judge Bartels' order of June 24 detail with great specificity the exact legal services provided by appellees' counsel (21-22, 27-28). Indeed, as these affidavits show, appellees were billed an amount of \$1,683.20 for services provided through May 28, 1975, which were directly related to the confusion and inconvenience caused by appellant's failures to appear at pre-trial conferences.

Against this record, Judge Bartels determined that \$1,000 was the fair and proper award; indeed, Judge Bartels reduced the figure of \$1,200 included in the proposed order to \$1,000 (5). Moreover, it should be noted

that in determining the amount of attorney's fees to be awarded, Judge Bartels intended to reimburse appellees for their legal expenses resulting from appellant's inexcusable conduct (Tr. 5, 11); while the record before him supported the award of \$1,000, the costs and attorney's fees incurred in connection with this appeal represent further expenses resulting directly from appellant's failures to appear.

Thus, the district court properly exercised its discretion when it awarded to appellees attorney's fees in the amount of \$1,000.

CONCLUSION

For all of the foregoing reasons, appellees respectfully request that the order appealed from be affirmed.

New York, New York
October 31, 1975

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APPENDIX

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Transcript of Hearing of May 22, 1975..... 1

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 -----X
4 NATIONAL EQUIPMENT RENTAL, LTD., :

5 Plaintiff, :

6 against :

73 C 825

7 B. QUINTIN & T. QUINTIN et al., :

8 Defendants :

9 -----X

10
11
12 United States Courthouse
13 Brooklyn, New York

14 May 22, 1975
15 9:30 a.m.

16 B e f o r e :

17 HONORABLE JOHN R. BARTELS,

18 U.S.D.J.

19 I hereby certify that the foregoing is a
20 true and accurate transcript from my sten-
21 ographic notes in this proceeding.

21 *Sheldon Silverman* CSK
22 Official Court Reporter
23 U.S. District Court for the
24 Eastern District of N.Y.
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Appearances:

JEROME HELLER, Esq.
Attorney for Plaintiffs

MICHAEL S. OBERMAN, Esq.
Attorney for Defendants

1 THE COURT: This is a motion to restore
2 a case to the calendar after it had been dismissed
3 for the failure of the plaintiffs' attorney to
4 appear for a status report on it, I think it was
5 April 22.

6 MR. HELLER: I believe so.

7 MR. OBERMAN: This motion was originally
8 set for April 22.

9 THE COURT: This particular motion here?

10 MR. OBERMAN: Yes.

11 THE COURT: But the dismissal was on March
12 18, for failure of the plaintiffs' attorney to appear.

13 As I understand it, Mr. Jacobs, you failed
14 to appear three times.

15 MR. HELLER: I'm Mr. Heller.

16 THE COURT: Mr. Heller, your office failed
17 to appear three times, isn't that right?

18 MR. HELLER: Twice that I recall.

19 MR. OBERMAN: Including the first return
20 date of this motion.

21 THE COURT: Why don't you give me the dates
22 so the reporter will have the dates and the history
23 of this dismissal will be brought up to date. The
24 case was first filed, removed here, I think, on June
25 27, 1973, so it's been here approximately two years

1 and during that time, according to the docket, the
2 case was called for a status report after a few
3 preliminary motions, I think on December 13, 1973,
4 and after the plaintiffs' attorneys did not appear
5 and I dismissed the action permitting a cure in
6 thirty days if the plaintiffs' attorney filed an
7 affidavit, I vacated the order on January 31, 1974,
8 after receiving an affidavit from, I think, Nick
9 LeMar--

10 MR. HELLER: He's of counsel to the plaintiff.

11 THE COURT: That's right. I received it.

12 MR. OBERMAN: That's not going back.

13 MR. HELLER: They were for the defendant.

14 THE COURT: It's a copy of a letter. Anyway,
15 I then vacated that dismissal on January 31, 1974.

16 I then called the case for status report
17 again on March 18, 1975. Again the plaintiffs'
18 attorneys did not appear. I again dismissed it on
19 March 18, 1975. Therefore, there's been three
20 dismissals--

21 MR. HELLER: Two.

22 MR. OBERMAN: After it was dismissed the
23 second time, the motion was made to put it back on
24 the calendar. That was originally set for April 4th,
25 then adjourned to April 22, and plaintiff failed to

1 show up on the return date of the motion, so at that
2 point the motion was not granted, obviously.

3 THE COURT: That was on April 22, he didn't
4 show. That's the posture of the case. I am now
5 hearing this motion again for plaintiff to restore
6 it. What do you say, Mr. Heller? You tell me why
7 I should restore this case after these constant
8 failures on the part of the plaintiffs' attorney to
9 appear and the difficulty that's been caused to
10 this Court in running its calendar, because every
11 time you fail to appear and I permit you to restore
12 the case, then, of course, you bring down the
13 defendants' attorneys on the hearing for restoration,
14 which is unnecessarily expensive and unfair to the
15 defendants' attorney and unfair to this court and
16 makes me hear things not only twice, but really
17 four times, when you should have been there the first
18 time.

19 Now it's more than that here because you
20 didn't even show up on your application to restore
21 the case to the calendar. You know that this Court
22 is not going to tolerate that, don't you, Mr. Heller?

23 MR. HELLER: Yes. However, at that point
24 and when the motion was made there was no opposing
25 counsel.

1 THE COURT: What do you mean, motion? What
2 motion?

3 MR. HELLER: When the motion was made to
4 restore last time--

5 THE COURT: What relevance is that?

6 MR. HELLER: There was no counsel for the
7 defendant.

8 THE COURT: They were in the process of
9 getting counsel because Golenbach asked--

10 MR. OBERMAN: They were relieved by your
11 order.

12 THE COURT: That makes no difference whatso-
13 ever. Here you have a California defendant and they
14 have to engage New York attorneys and this matter
15 has been unnecessarily abrasive to them and to the
16 Court. It's been unfair, and beyond that I should
17 consent to restore this case to this calendar. What
18 do you have to say? You represent the defendants.
19 Let him finish.

20 MR. HELLER: If I may--

21 THE COURT: You had a flat tire or isn't it
22 that?

23 MR. HELLER: Mr. LaMar had a flat tire.

24 THE COURT: He has a flat tire now. He for-
25 got to put the note on his desk, et cetera, et

1 cetera, et cetera. That sort of practice will not
2 be tolerated here.

3 He didn't show up when the application was
4 made to restore the case to the calendar. Now what
5 was that excuse?

6 MR. HELLER: I appeared. I came in that day.

7 THE COURT: Wait a minute; not according to
8 this docket. This docket says--

9 MR. HELLER: I called this court. I had
10 trouble with the car. I couldn't get in.

11 THE COURT: But you did not appear.

12 MR. HELLER: I couldn't get in in time.

13 THE COURT: That's not the Court's fault.
14 You must appear. If you're going to remain in
15 this case, we can't put up with that sort of things.
16 There are ways and means to come here. Other
17 attorneys come here.

18 MR. HELLER: I appreciate that.

19 THE COURT: It isn't just that one case
20 where you had a flat tire, but there are other
21 instances, like you failed to put your note down
22 on the desk or someone else did.

23 I'll listen to the defendant.

24 MR. OBERMAN: Thank you.

25 Our firm was retained yesterday by California

1 counsel to appear on the return of this motion.
2 We're asked to present these facts to you as your
3 Honor has just outlined.

4 This case is a two-year-old action in which
5 nothing at all has happened.

6 THE COURT: Nothing has happened.

7 MR. OBERMAN: No discovery.

8 THE COURT: I can't keep ahold of the case
9 because the plaintiff doesn't appear.

10 MR. OBERMAN: For a period of one and a half
11 years approximately defendant had no counsel. The
12 client was under the impression the case was dis-
13 missed. It's been on the calendar, off the calendar.

14 THE COURT: That's why he had no counsel,
15 because I had dismissed it.

16 MR. OBERMAN: Yesterday we got a call from
17 the California counsel saying apparently there might
18 be a chance it's going to come alive again, somebody
19 better go there and say this is silly.

20 We have a California client who had no contact
21 in New York, who got caught in this action because
22 of some clause in the contract that says "New York
23 jurisdiction." Indeed, on the contract, Lake Success
24 was written in according to the technical form
25 contract, means it's not binding, but beyond that,

1 we have a situation where every time the case comes
2 on they don't show up. It gets dismissed. New
3 counsel has to be retained by defendant, and it's
4 causing them severe prejudice. They're a family
5 business. This is hanging over them. They think
6 it's not a valid claim. Costs are being incurred.
7 They have to pay legal bills just to appear at
8 these status conferences, and even if it gets down
9 for trial to finally resolve it, there's no chance
10 counsel is going to show up for plaintiff.

11 MR. HELLER: Please.

12 MR. OBERMAN: Here it is significant to
13 note we're not dealing with outside counsel for
14 plaintiff, we're dealing with house counsel, which
15 may suggest among all the cases that are pending
16 for this plaintiff, they don't think this case is
17 significant enough to make sure someone gets up
18 early enough to get here for court, or someone
19 makes a note on the calendar or someone knows how
20 to fix a flat tire to get here on time.

21 Three times means to us enough is enough.
22 The California defendant should not be asked to
23 go through this tactic.

24 THE COURT: I'll dismiss this action on
25 condition that it can be restored within thirty

1 days upon payment of the expenses and counsel
2 fees of the defendant, not to exceed \$1200.

3 MR. HELLER: You want--

4 THE COURT: \$1200. That's not enough for
5 the expenses.

6 MR. HELLER: As a matter of fact, your Honor--

7 THE COURT: It will be dismissed on that
8 condition. You can restore it by payment to
9 attorneys for the defense for their expenses and time.
10 \$1200 on their submitting affidavits showing they
11 have expended and sustained damages to that extent.

12 Next case.

13 MR. HELLER: If I may, your Honor, there were
14 no attorneys for the defendants here--

15 MR. OBERMAN: That's not true.

16 THE COURT: Next case, next case. Submit
17 the order. You can't try cases like that in this
18 court. Submit the order, please.

19 MR. OBERMAN: Within what date, your Honor?

20 THE COURT: With the affidavits showing
21 that you have--

22 MR. OBERMAN: What date, sir?

23 THE COURT: A week, you can do that within
24 a week, I guess, unless if you haven't incurred those
25 expenses, I'm not going to grant you those.

1 MR. OBERMAN: Just to clarify: there was
2 counsel in California consulted about the validity
3 of the case--

4 THE COURT: Don't build it up.

5 MR. OBERMAN: I won't, your Honor.

6 THE COURT: I have been around a little bit,
7 practiced law for some time. I know just what's
8 done, but be fair and I'm going to award you your
9 costs and expenses in this case up to date, as to
10 failure of the plaintiff to appear.

11 He doesn't have to pay it. We'll just dismiss
12 the case on that condition, that within thirty days
13 it will be restored upon another affidavit showing
14 merits on his part plus the payment of those fees
15 after you submit affidavits that they have been
16 expended. Next case.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL EQUIPMENT RENTAL, LTD,

Plaintiff-Appellant,

- against -

BERNARD QUINTIN Et al.,

Defendants-Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Eugene L. St. Louis, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at

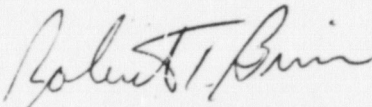
1235 Plane Street, Union, N.J. 07083

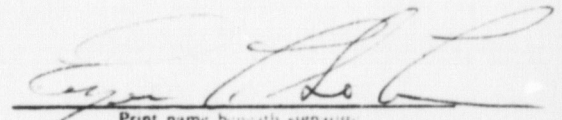
That on the 31st day of October 19 75, deponent served the annexed Brief & Appendix
upon Gerald S. Jacobs attorney(s) for

Plaintiff-Appellant in this action, at 410 Lakeville Rd., Lake Success, N.Y. 11040

the address designated by said attorney(s) for that
purpose, depositing ² true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 31st
day of October 19 75




Print name beneath signature
EUGENE L. ST. LOUIS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

